

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY COOPER : CIVIL ACTION
 :
 v. :
 :
 DONALD T. VAUGHN, et al. : NO. 00-6016

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

November 6, 2001

Petitioner Larry Cooper ("Cooper"), a state prisoner convicted of murder, robbery, criminal conspiracy, and possession of instruments of crime, seeks a writ of habeas corpus under 28 U.S.C. § 2254. This court referred Cooper's pro se petition to Magistrate Judge Carol Sandra Moore Wells who issued a Report and Recommendation. For the reasons stated below, Judge Wells' Report will be approved in part and disapproved in part and her Recommendation will be approved. Cooper's petition will be denied.

BACKGROUND

Cooper was convicted by a state jury on May 14, 1981. See Commonwealth v. Cooper, No. 773, slip op. at 1 (C.C.P. Philadelphia County, March 5, 1982). Following denial of post-trial motions, he was sentenced to life imprisonment for murder, preceded by successive sentences totaling 22 to 45 years on robbery, criminal conspiracy, and possession of instruments of

crime. See Commonwealth v. Cooper, No. 2533, slip op. at 1 (Pa. Super. Ct., August 5, 1983).

Cooper appealed to the Pennsylvania Superior Court. The Superior Court affirmed his conviction on August 5, 1983. See Commonwealth v. Cooper, 464 A.2d 516 (Pa. Super. 1983). Cooper did not file a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

On December 18, 1981, Cooper filed his first pro se petition under Pennsylvania's Post Conviction Hearing Act ("PCHA"), 42 Pa. C.S.A. § 9541, et seq. On January 8, 1982, this was dismissed as premature because Cooper's Superior Court appeal was pending. Commonwealth v. Cooper, October 1980, 773-777 (C.C.P. Philadelphia County 1982).

On June 21, 1984, Cooper filed his second PCHA petition pro se, later amended by appointed counsel, raising ineffective assistance of trial counsel claims that his lawyer: (1) failed to call Cooper to testify during the trial despite his requests; (2) failed to interview and call four defense witnesses; (3) failed to obtain expert testimony concerning the effect of substance abuse on Cooper's mental capacity; and (4) failed to raise a diminished capacity defense. See Commonwealth v. Cooper, No. 773, slip op. at 3-4 (C.C.P. Philadelphia County, September 27, 1994). Ten years later and after holding evidentiary hearings, Judge Joseph I. Papalini denied Cooper's PCHA petition. See id.

at 3. Cooper appealed to Superior Court reasserting grounds (1), (2), and (4). Commonwealth v. Cooper, No. 2022, slip op. at 2 (Pa. Super. 1995). On July 10, 1995, the Superior Court affirmed denial of Cooper's second PCHA claim. Id. at 6. Cooper again did not seek allocatur to the state Supreme Court.

On October 2, 1998, Cooper filed his third petition for post-conviction relief, now under the Pennsylvania Post Conviction Relief Act ("PCRA"), which replaced the PCHA in 1988. See 42 Pa. C.S.A. § 9545 et seq.; 1988 Pa. Laws 336. He averred counsel: (1) improperly advised him not to testify during the guilt/innocence phase of his trial; (2) failed to investigate and present the testimony of known, available defense witnesses to present and establish his diminished capacity defense; (3) failed to investigate and present testimony of a mental health expert about how Cooper's history of abuse precluded him from forming criminal intent to kill; (4) failed to raise appropriate objection to a jury instruction that Cooper could be convicted if his accomplice had formed intent to kill; (5) failed to raise appropriate objection to a 10 to 20 year sentence for criminal conspiracy when the statutory maximum was 5 to 10 years; and (6) failed to raise appropriate objection to imposition of a sentence of imprisonment for the inchoate crime possession of an instrument of crime when Cooper had already been sentenced for another inchoate crime, criminal conspiracy, and Pennsylvania law

prohibits imposition of sentence on two inchoate crimes. See Commonwealth v. Cooper, Nos. 773-777, Petition under the PCRA at 2-4 (C.C.P. Philadelphia County October 2, 1998). This petition was dismissed as untimely on January 20, 1999, and the Superior Court upheld that denial. See Commonwealth v. Cooper, No. 437 EDA 1999, slip op. at 5 (Pa. Super. 1999). The Supreme Court of Pennsylvania denied Cooper's petition to file for allocatur nunc pro tunc on April 25, 2001. See Commonwealth v. Cooper, 18 E.D. Misc. Docket 2000.

On November 28, 2000, Cooper filed the instant habeas corpus petition alleging ineffective assistance of trial counsel. This court referred Cooper's petition to Magistrate Judge Carol Sandra Moore Wells on February 14, 2001. Judge Wells issued her Report and Recommendation, now before this court with objections, on May 31, 2001. She held Cooper's petition time-barred under AEDPA and recommended it be dismissed without an evidentiary hearing. As alternate grounds of dismissal, she held: (1) Cooper's PCRA petition was not "properly filed" under AEDPA; (2) the untimeliness of Cooper's PCRA petition under Pennsylvania law presents an independent and adequate procedural bar against consideration of his habeas petition; and (3) Cooper did not establish cause for the lateness of his PCRA petition.

Cooper makes the following objections to Judge Wells' Report and Recommendation: (1) Judge Wells violated Local Rule

9.4(7) by not allowing Cooper 30 days to file his reply to the Commonwealth's response; (2) the AEDPA time limit should be equitably tolled; and (3) there is sufficient cause and prejudice to override his procedural default.

DISCUSSION

I. Cooper's Petition is Time-Barred Under AEDPA

Title 28 U.S.C. § 2244(d) provides in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; ...

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

See 28 U.S.C. § 2244(d).

Section 2244(d) became effective on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. Cooper did not seek direct review in the Pennsylvania Supreme Court¹; his sentence became final on

¹Cooper asserts his failure to seek review in Pennsylvania's highest court was due to ineffective assistance of counsel. See petition dated January 3, 2001 at 8. As Judge Wells found, he did not raise this alleged ineffective assistance of counsel as a ground for habeas relief, nor does he support it with argument or elaboration. He has offered no factual basis for habeas relief on this ground. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991) ("bald assertions and conclusory allegations do

September 4, 1983, thirty days after the Superior Court affirmed his judgment of sentence.

"[T]o bar the filing of a habeas petition before April 24, 1997, where the prisoner's conviction became final before April 24, 1996, would be impermissibly retroactive." Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). AEDPA's one-year deadline for Cooper's habeas claim expired on April 24, 1997, unless he has shown equitable or statutory tolling is appropriate. As discussed below, Cooper has not shown any circumstance to render tolling appropriate. His habeas corpus petition is time-barred under AEDPA.

A. Equitable Tolling is Not Appropriate

The one-year limitation in § 2244(d) is a statute of limitations, not a jurisdictional bar, and may be equitably tolled. See Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998).

[E]quitable tolling is proper only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient.

Id. at 618-619 (internal citations, quotations, and punctuation

not provide sufficient ground to ... require an evidentiary hearing").

omitted). As Judge Wells found, Cooper has failed to demonstrate (or allege) any "extraordinary circumstances" unfairly prevented him from asserting his rights. Id. at 618. He has also failed to show he "exercised reasonable diligence in investigating and bringing" his claim. Id.

B. Statutory Tolling is Not Appropriate

Cooper's habeas petition was not filed until October 31, 2000 -- forty months after the AEDPA deadline of April 23, 1997. His related PCRA claim did not toll the AEDPA time limit: it was not filed until October 2, 1998, and was never pending before expiration of the time limit.

II. Cooper's PCRA Petition Was "Properly Filed" Under Federal Law

As an alternative ground of dismissal, Judge Wells held Cooper's PCRA petition would not have tolled the AEDPA limitation period even had it been submitted before the deadline since it was not "properly filed" under § 2244(d)(2). Though neither the Third Circuit nor the Supreme Court has directly addressed the question, the weight of authority indicates this is a misreading of the law.

The Supreme Court has held under § 2244(d)(2),

[A]n application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged,

and the requisite filing fee.

Artuz v. Bennett, 531 U.S. 4, 8 (2000). Cooper's PCRA petition was untimely under Pennsylvania law,² too late for him to obtain relief, but nonetheless was "properly filed" under federal law.

"The question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of

² (B) TIME FOR FILING PETITION.--

1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. ...

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

See 42 Pa. Cons. Stat. § 9545(b) (2001).

procedural bar." See Nara v. Frank, 264 F.3d 310, 2001 U.S. App. LEXIS 19340 at *13 (3d Cir. 2001), quoting Artuz, 531 U.S. at 9. Mr. Cooper's last PCRA petition was procedurally barred under § 9545(b) because it was filed more than one year after his conviction became final and did not fall under any of the statute's exceptions. But it was "properly filed" when it was received by the state court and the exceptions under PCRA § 9545(b) required it be accorded enough judicial review to determine that it fell short.

As the Ninth Circuit recently held, "if a state's rule governing the timely commencement of state post-conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed'." See Dictado v. Ducharme, 244 F.3d 724, 727-28 (9th Cir. 2001). Title 42 Pa. Cons. Stat. § 9545(b) discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement. See Smith v. Ward, 209 F.3d 383, 384-85 (5th Cir. 2000) (petition is "properly filed" when it satisfies "those prerequisites that must be satisfied before a state court will allow a petition to be filed and accorded some level of judicial review," and a state statute of limitations is a limitation on

relief, not a "procedural filing requirement"); Robinson v. Ricks, 2001 U.S. Dist. LEXIS 14227, *15-*16 (E.D.N.Y. 2001) (following Dictado).

Though this question has not yet been directly addressed by the Court of Appeals for the Third Circuit, there is a "flexible approach" to 28 U.S.C. § 2244(d)(2) questions in this circuit, as in the Fifth and Ninth Circuits. See, e.g., Nara, 2001 U.S. App. LEXIS 19340 at *12-*15 (describing the court's "flexible approach" to AEDPA tolling questions and holding a motion to withdraw a guilty plea nunc pro tunc was a "properly filed application for state post-conviction or other collateral review within the meaning of § 2244(d)(2)"); accord Dictado, 244 F.3d 724 (9th Cir. 2001) (petitions dismissed in state court as "repetitive and untimely" still "properly filed" under § 2244(d)(2)) (cited with approval in Nara); Villegas v. Johnson, 184 F.3d 467, 469-70 (5th Cir. 1999) (petition dismissed in state court as successive or an abuse of the writ still "properly filed" under § 2244(d)(2)) (cited with approval in Nara); but cf. Morris v. Horn, 187 F.3d 333, 338 (3d Cir. 1999) (pre-Artuz and Nara opinion stating in dicta a PCRA petition filed outside the state statutory time guidelines would not be "properly filed").

C. It is Not Necessary to Address Cause and Prejudice

Judge Wells held Cooper's late filing of his PCRA petition and consequent failure to meet the timing requirements

of 42 Pa. Cons. Stat. § 9545(b) constitutes an independent and adequate procedural basis for precluding federal review of Cooper's habeas petition. Cooper objects to this finding, claiming he had cause for and was prejudiced by his delay. Because the instant habeas petition is barred under AEDPA, it is not necessary to reach these questions.

D. Petitioner's Other Objection is Meritless

Cooper objects to Judge Wells' Report and Recommendation on grounds that she violated Local Rule 9.4(7) by not allowing him 30 days to file his reply to the Commonwealth's response to his petition. That local rule pertains only to death penalty cases, and does not apply to Mr. Cooper's case.

CONCLUSION

The instant petition under 28 U.S.C. § 2254 will be denied without an evidentiary hearing.

An appropriate order follows.

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ORDER

AND NOW, this ____ day of November, 2001, upon de novo review of the record, the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells and petitioner Larry Cooper's objections thereto, and in accordance with the attached memorandum, it is hereby **ORDERED** that the Report submitted by Judge Wells is **APPROVED IN PART** and **DISAPPROVED IN PART**, and her Recommendation is **ACCEPTED** as follows:

1. Cooper's objections to Judge Wells' Report and Recommendation are **REJECTED**.

2. Cooper's petition for post-conviction relief under 42 Pa. C.S.A. § 9545 was "properly filed" under 28 U.S.C. § 2244(d).

3. Cooper's petition for federal habeas corpus relief under 28 U.S.C. § 2254 was untimely and not subject to equitable or statutory tolling. It is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

4. There is no probable cause to issue a certificate of appealability.

Norma L. Shapiro, S.J.

